

104TH CONGRESS
1ST SESSION

H. R. 489

To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 11, 1995

Mr. SMITH of Texas (for himself, Mr. THORNBERRY, Mr. KNOLLENBERG, Mr. BONILLA, and Mr. MCHUGH) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Property Rights
5 Litigation Relief Act of 1995”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds that—

8 (1) the private ownership of property is essen-
9 tial to a free society and is an integral part of the

1 American tradition of liberty and limited govern-
2 ment;

3 (2) the framers of the United States Constitu-
4 tion, in order to protect private property and liberty,
5 devised a framework of Government designed to dif-
6 fuse power and limit Government;

7 (3) to further ensure the protection of private
8 property, the fifth amendment to the United States
9 Constitution was ratified to prevent the taking of
10 private property by the Federal Government, except
11 for public use and with just compensation;

12 (4) the purpose of the takings clause of the
13 fifth amendment of the United States Constitution,
14 as the Supreme Court stated in *Armstrong v. United*
15 *States*, 364 U.S. 40, 49 (1960), is “to bar Govern-
16 ment from forcing some people alone to bear public
17 burdens, which in all fairness and justice, should be
18 borne by the public as a whole”;

19 (5) the Federal Government, in its haste to
20 ameliorate public harms and environmental abuse,
21 has singled out property holders to shoulder the cost
22 that should be borne by the public, in violation of
23 the just compensation requirement of the takings
24 clause of the fifth amendment of the United States
25 Constitution;

1 (6) there is a need to both restrain the Federal
2 Government in its overzealous regulation of the pri-
3 vate sector and to protect private property, which is
4 a fundamental right of the American people;

5 (7) the incremental, fact-specific approach that
6 courts now are required to employ in the absence of
7 adequate statutory language to vindicate property
8 rights under the fifth amendment of the United
9 States Constitution has been ineffective and costly
10 and there is a need for Congress to clarify the law
11 and provide an effective remedy;

12 (8) certain provisions of sections 1346 and
13 1402 and chapter 91 of title 28, United States Code
14 (commonly known as the Tucker Act), that delin-
15 eates the jurisdiction of courts hearing property
16 rights claims, complicates the ability of a property
17 owner to vindicate a property owner's right to just
18 compensation for a governmental action that has
19 caused a physical or regulatory taking;

20 (9) current law—

21 (A) forces a property owner to elect be-
22 tween equitable relief in the district court and
23 monetary relief (the value of the property
24 taken) in the United States Court of Federal
25 Claims;

1 (B) is used to urge dismissal in the district
2 court on the ground that the plaintiff should
3 seek just compensation in the Court of Federal
4 Claims; and

5 (C) is used to urge dismissal in the Court
6 of Federal Claims on the ground that plaintiff
7 should seek equitable relief in district court;

8 (10) property owners cannot fully vindicate
9 property rights in one court;

10 (11) property owners should be able to fully re-
11 cover for a taking of their private property in one
12 court;

13 (12) certain provisions of section 1346 and
14 1402 and chapter 91 of title 28, United States Code
15 (commonly known as the Tucker Act) should be
16 amended, giving both the district courts of the Unit-
17 ed States and the Court of Federal Claims jurisdic-
18 tion to hear all claims relating to property rights;
19 and

20 (13) section 1500 of title 28, United States
21 Code, which denies the Court of Federal Claims ju-
22 risdiction to entertain a suit which is pending in an-
23 other court and made by the same plaintiff, should
24 be repealed.

1 **SEC. 3. PURPOSE.**

2 The purpose of this Act is to—

3 (1) encourage, support, and promote the private
4 ownership of property by ensuring the constitutional
5 and legal protection of private property by the Unit-
6 ed States Government;

7 (2) establish a clear, uniform, and efficient ju-
8 dicial process whereby aggrieved property owners
9 can obtain vindication of property rights guaranteed
10 by the fifth amendment to the United States Con-
11 stitution and this Act;

12 (3) amend certain provisions of the Tucker Act,
13 including the repeal of section 1500 of title 28,
14 United States Code;

15 (4) rectify the constitutional imbalance between
16 the Federal Government and the States; and

17 (5) require the Federal Government to com-
18 pensate property owners for the deprivation of prop-
19 erty rights that result from State agencies' enforce-
20 ment of federally mandated programs.

21 **SEC. 4. DEFINITIONS.**

22 For purposes of this Act the term—

23 (1) “agency” means a department, agency,
24 independent agency, or instrumentality of the United
25 States, including any military department, Govern-
26 ment corporation, Government-controlled corpora-

1 tion, or other establishment in the executive branch
2 of the United States Government;

3 (2) “agency action” means any action or deci-
4 sion taken by an agency that—

5 (A) takes a property right; or

6 (B) unreasonably impedes the use of prop-
7 erty or the exercise of property interests or sig-
8 nificantly interferes with investment-backed ex-
9 pectations;

10 (3) “just compensation”—

11 (A) means compensation equal to the full
12 extent of a property owner’s loss, including the
13 fair market value of the private property taken
14 and business losses arising from a taking,
15 whether the taking is by physical occupation or
16 through regulation, exaction, or other means;
17 and

18 (B) shall include compounded interest cal-
19 culated from the date of the taking until the
20 date the United States tenders payment;

21 (4) “owner” means the owner or possessor of
22 property or rights in property at the time the taking
23 occurs, including when—

1 (A) the statute, regulation, rule, order,
2 guideline, policy, or action is passed or promul-
3 gated; or

4 (B) the permit, license, authorization, or
5 governmental permission is denied or sus-
6 pended;

7 (5) “private property” or “property” means all
8 property protected under the fifth amendment to the
9 Constitution of the United States, any applicable
10 Federal or State law, or this Act, and includes—

11 (A) real property, whether vested or
12 unvested, including—

13 (i) estates in fee, life estates, estates
14 for years, or otherwise;

15 (ii) inchoate interests in real property
16 such as remainders and future interests;

17 (iii) personalty that is affixed to or
18 appurtenant to real property;

19 (iv) easements;

20 (v) leaseholds;

21 (vi) recorded liens; and

22 (vii) contracts or other security inter-
23 ests in, or related to, real property;

1 (B) the right to use water or the right to
2 receive water, including any recorded lines on
3 such water right;

4 (C) rents, issues, and profits of land, in-
5 cluding minerals, timber, fodder, crops, oil and
6 gas, coal, or geothermal energy;

7 (D) property rights provided by, or memo-
8 rialized in, a contract, except that such rights
9 shall not be construed under this title to pre-
10 vent the United States from prohibiting the for-
11 mation of contracts deemed to harm the public
12 welfare or to prevent the execution of contracts
13 for—

14 (i) national security reasons; or

15 (ii) exigencies that present immediate
16 or reasonably foreseeable threats or inju-
17 ries to life or property;

18 (E) any interest defined as property under
19 State law; or

20 (F) any interest understood to be property
21 based on custom, usage, common law, or mutu-
22 ally reinforcing understandings sufficiently well-
23 grounded in law to back a claim of interest;

1 (6) “State agency” means any State depart-
2 ment, agency, political subdivision, or instrumental-
3 ity that—

4 (A) carries out or enforces a regulatory
5 program required under Federal law;

6 (B) is delegated administrative or sub-
7 stantive responsibility under a Federal regu-
8 latory program; or

9 (C) receives Federal funds in connection
10 with a regulatory program established by a
11 State pursuant to a Federal requirement,
12 if the State enforcement of the regulatory program,
13 or the receipt of Federal funds in connection with a
14 regulatory program established by a State, is di-
15 rectly related to the taking of private property seek-
16 ing to be vindicated under this Act; and

17 (7) “taking of private property”—

18 (A) means any action whereby private
19 property is directly taken as to require com-
20 pensation under the fifth amendment to the
21 United States Constitution or under this Act,
22 including by physical invasion, regulation, exac-
23 tion, condition, or other means; and

24 (B) shall not include—

- 1 (i) a condemnation action filed by the
2 United States in an applicable court; or
3 (ii) an action filed by the United
4 States relating to criminal forfeiture.

5 **SEC. 5. COMPENSATION FOR TAKEN PROPERTY.**

6 (a) IN GENERAL.—No agency or State agency, shall
7 take private property except for public purpose and with
8 just compensation to the property owner. A property
9 owner shall receive just compensation if—

10 (1) as a consequence of a decision of any agen-
11 cy, or State agency, private property (whether all or
12 in part) has been physically invaded or taken for
13 public use without the consent of the owner; and

14 (2)(A) such action does not substantially ad-
15 vance the stated governmental interest to be
16 achieved by the legislation or regulation on which
17 the action is based;

18 (B) such action exacts the owner's constitu-
19 tional or otherwise lawful right to use the property
20 or a portion of such property as a condition for the
21 granting of a permit, license, variance, or any other
22 agency action without a rough proportionality be-
23 tween the stated need for the required dedication
24 and the impact of the proposed use of the property;

1 (C) such action results in the property owner
2 being deprived, either temporarily or permanently, of
3 all or substantially all economically beneficial or pro-
4 ductive use of the property or that part of the prop-
5 erty affected by the action without a showing that
6 such deprivation inheres in the title itself;

7 (D) such action diminishes the fair market
8 value of the affected portion of the property which
9 is the subject of the action by the lesser of—

10 (i) 10 percent or more with respect to the
11 value immediately prior to the governmental ac-
12 tion; or

13 (ii) \$10,000, or more with respect to the
14 value immediately prior to the governmental ac-
15 tion; or

16 (E) under any other circumstance where a tak-
17 ing has occurred within the meaning of the fifth
18 amendment of the United States Constitution.

19 (b) BURDEN OF PROOF.—(1) The Government shall
20 bear the burden of proof in any action described under—

21 (A) subsection (a)(2)(A), with regard to show-
22 ing the nexus between the stated governmental pur-
23 pose of the governmental interest and the impact on
24 the proposed use of private property;

1 (B) subsection (a)(2)(B), with regard to show-
2 ing the proportionality between the exaction and the
3 impact of the proposed use of the property; and

4 (C) subsection (a)(2)(C), with regard to show-
5 ing that such deprivation of value inheres in the title
6 to the property.

7 (2) The property owner shall have the burden of
8 proof in any action described under subsection (a)(2)(D),
9 with regard to establishing the diminution of value of
10 property.

11 (c) COMPENSATION AND NUISANCE EXCEPTION TO
12 PAYMENT OF JUST COMPENSATION.—(1) No compensa-
13 tion shall be required by this Act if the owner's use or
14 proposed use of the property is a nuisance as commonly
15 understood and defined by background principles of nui-
16 sance and property law, as understood within the State
17 in which the property is situated, and to bar an award
18 of damages under this Act, the United States shall have
19 the burden of proof to establish that the use or proposed
20 use of the property is a nuisance.

21 (2) Subject to paragraph (1), if an agency action di-
22 rectly takes property or a portion of property under sub-
23 section (a), compensation to the owner of the property
24 that is affected by the action shall be either the greater
25 of an amount equal to—

1 (A) the difference between—

2 (i) the fair market value of the property or
3 portion of the property affected by agency ac-
4 tion before such property became the subject of
5 the specific government regulation; and

6 (ii) the fair market value of the property
7 or portion of the property when such property
8 becomes subject to the agency action; or

9 (B) business losses.

10 (d) TRANSFER OF PROPERTY INTEREST.—The Unit-
11 ed States shall take title to the property interest for which
12 the United States pays a claim under this Act.

13 (e) SOURCE OF COMPENSATION.—The compensation
14 referred to in this section shall be paid out of funds made
15 available to the Federal agency or department by appro-
16 priation for the fiscal year in which the property depriva-
17 tion referred to in this section occurred. If no such funds
18 have been made available to the agency, such payment
19 shall be made from the Judgment Fund.

20 **SEC. 6. JURISDICTION AND JUDICIAL REVIEW.**

21 (a) IN GENERAL.—A property owner may file a civil
22 action under this Act to challenge the validity of any agen-
23 cy action that adversely affects the owner's interest in pri-
24 vate property in either the United States District Court
25 or the United States Court of Federal Claims. This section

1 constitutes express waiver of the sovereign immunity of
2 the United States. Notwithstanding any other provision of
3 law and notwithstanding the issues involved, the relief
4 sought, or the amount in controversy, each court shall
5 have concurrent jurisdiction over both claims for monetary
6 relief and claims seeking invalidation of any Act of Con-
7 gress or any regulation of an agency as defined under this
8 Act affecting private property rights. The plaintiff shall
9 have the election of the court in which to file a claim for
10 relief.

11 (b) STANDING.—Persons adversely affected by an
12 agency action taken under this Act shall have standing
13 to challenge and seek judicial review of that action.

14 (c) AMENDMENTS TO TITLE 28, UNITED STATES
15 CODE.—(1) Section 1491(a) of title 28, United States
16 Code, is amended—

17 (A) in paragraph (1) by amending the first sen-
18 tence to read as follows: “The United States Court
19 of Federal Claims shall have jurisdiction to render
20 judgment upon any claim against the United States
21 for monetary relief founded either upon the Con-
22 stitution or any Act of Congress or any regulation
23 of an executive department, or upon any express or
24 implied contract with the United States, in cases not
25 sounding in tort, or for invalidation of any Act of

1 Congress or any regulation of an executive depart-
2 ment that adversely affects private property rights
3 in violation of the fifth amendment of the United
4 States Constitution”;

5 (B) in paragraph (2) by inserting before the
6 first sentence the following: “In any case within its
7 jurisdiction, the Court of Federal Claims shall have
8 the power to grant injunctive and declaratory relief
9 when appropriate.”; and

10 (C) by adding at the end thereof the following
11 new paragraphs:

12 “(4) In cases otherwise within its jurisdiction,
13 the Court of Federal Claims shall also have ancillary
14 jurisdiction, concurrent with the courts designated in
15 section 1346(b) of this title, to render judgment
16 upon any related tort claim authorized under section
17 2674 of this title.

18 “(5) In proceedings within the jurisdiction of
19 the Court of Federal Claims which constitute judi-
20 cial review of agency action (rather than de novo
21 proceedings), the provisions of section 706 of title 5
22 shall apply.”.

23 (2)(A) Section 1500 of title 28, United States Code,
24 is repealed.

1 (B) The table of sections for chapter 91 of title 28,
2 United States Code, is amended by striking out the item
3 relating to section 1500.

4 **SEC. 7. STATUTE OF LIMITATIONS.**

5 The statute of limitations for actions brought under
6 this title shall be 6 years from the date of the taking of
7 property.

8 **SEC. 8. ATTORNEYS' FEES AND COSTS.**

9 The court, in issuing any final order in any action
10 brought under this Act, shall award costs of litigation (in-
11 cluding reasonable attorney and expert witness fees) to
12 any prevailing plaintiff.

13 **SEC. 9. ALTERNATIVE DISPUTE RESOLUTION.**

14 (a) IN GENERAL.—Either party to a dispute over a
15 taking of property as defined under this Act or litigation
16 commenced under this Act may elect to resolve the dispute
17 through settlement or arbitration. In the administration
18 of this section—

19 (1) such alternative dispute resolution may only
20 be effectuated by the consent of all parties;

21 (2) arbitration procedures shall be in accord-
22 ance with the alternative dispute resolution proce-
23 dures established by the American Arbitration Asso-
24 ciation; and

1 (3) in no event shall arbitration be a condition
2 precedent or an administrative procedure to be ex-
3 hausted before the filing of a civil action under this
4 Act.

5 (b) COMPENSATION AS A RESULT OF NEGOTIATED
6 SETTLEMENTS OR ARBITRATION.—The funds used for
7 compensation to the owner (as determined by the appro-
8 priate official of the Federal agency or department) shall
9 be taken from the responsible agency's budget for that fis-
10 cal year or transferred to the agency from the Judgment
11 Fund for payment to the owner.

12 (c) REVIEW OF ARBITRATION.—Appeal from arbitra-
13 tion decisions shall be to the United States District Court
14 or the United States Court of Federal Claims in the man-
15 ner prescribed by law for the claim under this Act.

16 (d) PAYMENT OF CERTAIN COMPENSATION.—In any
17 appeal under subsection (c) in which the court does not
18 rule for the Federal agency or department, the amount
19 of the award of compensation determined by the arbitrator
20 shall be paid from funds made available to the Federal
21 agency or department by appropriation in lieu of being
22 paid from the Judgment Fund, except that if no such
23 funds have been made available to the agency or depart-
24 ment such payment shall be made from the Judgment
25 Fund.

1 **SEC. 10. RULES OF CONSTRUCTION.**

2 Nothing in this Act shall be construed to interfere
3 with the authority of any State to create additional prop-
4 erty rights.

5 **SEC. 11. SEVERABILITY.**

6 If any provision of this Act, an amendment made by
7 this Act, or the application of such provision or amend-
8 ment to any person or circumstance is held to be unconsti-
9 tutional, the remainder of this Act, the amendments made
10 by this Act, and the application of the provisions of such
11 to any person or circumstance shall not be affected there-
12 by.

13 **SEC. 12. EFFECTIVE DATE.**

14 The provisions of this Act and amendments made by
15 this Act shall take effect on January 1, 1995 and shall
16 apply to any agency action that occurs on or after such
17 date.

○

HR 489 IH——2